Nos. 15,252, 15,253, 15,254

United States Court of Appeals

For the Ninth Circuit

MATANUSKA VALLEY LINES, INC., a corporation, and GENERAL CASUALTY COMPANY OF AMERICA, a corporation, LEWIS E. SIMPSON, LOUIS ODSATHER, J. A. COLUMBUS, H. N. BAKER, RUSSELL SWANK and NORMAN G. LANGE, *Appellants*, vs. DOROTHY NEAL and NATHANIEL NEAL, JR., *Appellees.*	No. 15,252
MATANUSKA VALLEY LINES, INC., a corporation, and GENERAL CASUALTY COMPANY OF AMERICA, a corporation, *Appellants*, vs. BLANCHE THOMAS, *Appellee.*	No. 15,253
MATANUSKA VALLEY LINES, INC., a corporation, and GENERAL CASUALTY COMPANY OF AMERICA, a corporation, *Appellants*, vs. WORDIE FRAZIER and PRINCE FRAZIER, *Appellees.*	No. 15,254

On Appeal from the United States District Court for the District of Alaska, Third Division.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

I.

JURISDICTION.

The appellees accept generally the jurisdictional statement of the appellants with particular reference to the provisions of 28 U.S.C., Sections 1291 and 1294.

II.

STATEMENT OF THE CASE.

The Pleadings.

Appellees concur generally in the review of the status of the pleadings contained in appellants' most recent brief under the headings "Pleadings and Jurisdiction" and "Statement of Case". (New Br. 1 and 3.)

This litigation arose originally from a collision between a bus and truck on a road near Anchorage, Alaska, November 20, 1951. Three separate actions were filed by fare-paying bus passengers and the spouses of two of them, against the owners and operators of the truck and the bus, alleging personal injuries as a result of negligence. (Old R., Vol. I, p. 3, Nos. 14,529, 14,530, 14,531.) Answers were filed by each defendant, and in two of the cases the bus line cross-claimed against the truck operator for damage to the bus. (Old R. 6-12.) A minute order of consolidation was entered by the District Court. (Old R. 51.)

The consolidated case was reached for trial in September, 1953, and jury verdicts totalling $101,500.00 were returned on September 24, 1953. (Old R. 12, No. 14,530.) A judgment was signed on October 12, 1953, and filed and entered on October 14, 1953. (Old R. 14, No. 14,531.)

Appellants filed objections to the proposed judgment, motions to set aside the verdicts, for new trial, supplementary motions for new trial, to reduce the amounts of the verdicts, and for revision of the judgment. (Old R. 12, 17-24, No. 14,531.) Only the mo-

tions for new trial were briefed, and although all motions were denied, only the motions for new trial were discussed in the written opinion of the trial court. (Old R. 51.)

Upon argument of the appeal, this Court noted that the judgment as entered did not dispose of the issues presented by the cross-claim. The appeals were dismissed on the ground that the judgment of October 12, 1953, failed to satisfy the provisions of Rule 54(b), Federal Rules of Civil Procedure. 220 F(2d) 136.

On November 2, 1955, the appellees moved for issuance of an order and certificate complying with Rule 54(b). (R. 5.) Appellants filed motions to set aside the verdicts or for new trial, to discharge supersedeas bonds and exonerate sureties, for a new trial, and to set bond on appeal. (R. 7, 9, 19, 22.) Appellees countered by moving for judgment on the supersedeas bonds. (R. 10.) On May 21, 1956, the motions for new trial, for discharge of bond and exoneration of sureties, and for judgment on the bonds were denied, and the motion for entry of judgment granted. (R. 11.) The motions were again disposed of, in the same fashion, after consideration of briefs. (R. 56-7.) The motion to set bond on appeal was denied on July 20, 1956. (R. 25.) An order and certificate under Rule 54(b) and a Final Judgment were signed and entered on May 21, 1956. (R. 12-17.) Notice of appeal was filed on June 20, 1956. (R. 21.)

During argument before the court relative to the various motions, the following additional facts were developed: (1) The defendant-appellant, Matanuska

Valley Lines, Inc., is now insolvent and in the hands of receivers (R. 78); (2) After the entry of the original judgment, plaintiffs caused execution to issue and a levy to be made, whereupon defendants obtained a stay of execution in order to give them time to post supersedeas bonds. (R. 106); (3) Having denied the motions for judgment on the bonds, and to exonerate sureties, the Court took the position that the question of the continuing effectiveness of the supersedeas bonds need not be decided at the time of argument. (R. 82, 84, 85.)

III.

SUMMARY OF ARGUMENT.

1. The judgment of October 12, 1953, was not appealable under Rule 54(b), but was conclusive of the issues between these parties.

2. Appellants are bound by the terms of the supersedeas bonds; they are estopped from repudiating their responsibility.

3. The trial court did not err in continuing the bonds in effect on this appeal.

4. The motion for new trial was properly denied; the judgment should be affirmed.

IV.

ARGUMENT.

1. THE JUDGMENT OF OCTOBER 12, 1953, WAS NOT APPEALABLE UNDER RULE 54(b), BUT WAS CONCLUSIVE OF THE ISSUES BETWEEN THESE PARTIES.

We submit that the appellants are mistaken both as to the purpose and effect of Rule 54(b). That rule, as now amended, reads as follows:

> "(b) Judgment Upon Multiple Claims. When more than one claim for relief is presented in an action, whether as a claim, counter-claim, cross-claim, or third-party claim, the court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates less than all of the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all of the claims."

A review of the history of this rule, as found in the advisory committee reports, the proposed amendments, the 1948 amendment, and the many cases interpreting it, leads to the definite conclusion that the rule is intended *only* to effectively prevent unjustified piecemeal appeals, and to give the appellant a means of determining when a judgment or order becomes appealable. None of the text writers or committee reports suggest any intention on the part of

the Supreme Court to modify the effectiveness of orders and judgments in any way, except as to appealability. III Barron and Holtzoff, "Federal Practice and Procedure", pp. 9-19, and cases cited therein; VI, Moore, "Fed. Practice", pp. 1261-1287, and cases cited.

As the Court of Appeals for the Seventh Circuit noted in *Winsor v. Daumit* (CA 7th 1950) 179 F(2d) 475:

> "The rule should not be considered as curtailing appellate jurisdiction but rather as one fixing the procedure of the District Court as to conditions of effecting terms upon which an appeal may be taken in the absence of a determination of the entire case. The right to appeal is not negated, but whether an appeal from a piecemeal order must await final disposition is left to the District Courts' decision."

There can be no question but that the failure of the trial court to make the determination and direction required by Rule 54(b) is fatal to the appeal, as this Court held in the present case. However, the appellate courts have demonstrated a uniform desire to facilitate the expeditious handling of a further appeal, should the trial court make such determination, without, however, infringing upon the discretion of the trial court in this regard. As was said in *Lyman v. Remington-Rand Co.* (CA 2d 1951) 188 F(2d) 306,

> "Nevertheless, the order is within that rule, as now amended, and is not final in the absence of the certificate of the court for which it provides.

> If the appellant provides such a certificate, the order will become final, and he may appeal within 30 days thereafter. In that event, the appeal may be heard upon the present record with only the certificate and new notices of appeal added; and also upon the present briefs, if the parties are so mindful. But upon this record, the present appeal must be dismissed."

See, also, *Tobin Packing Co., Inc. v. North American Car Corporation, et al* (CA 2d, 1951) 188 F(2d) 158, 159; *Roberts v. American Newspaper Guild, et al* (CA DC, 1951) 181 F(2d) 650, 651; *International Union v. United Electrical R&M Workers* (CA 6th, 1951), 192 F(2d) 847; *Walter W. Johnson Co. v. Reconstruction Finance Corporation,* (CA 9th, 1956), 230 F(2d) 479. The Second Circuit Court has indicated that, under some circumstances, a nunc pro tunc entry of the certificate required by the rule may be made. *Kauffman and Ruder, Inc. v. Cohn and Rosenberger,* (CA 2d 1949), 177 F(2d) 849.

The fact is that the meat of the present case was covered by the jury verdicts which were returned in September, 1953. Only a small claim for property damage between the two defendants was left undecided. Appellants have made no effort during the ensuing years to dispose of this cross-claim, and if it were determined, the outcome would not involve the appellees. All of these circumstances tend to substantiate our conviction that, while the initial judgment was not appealable, it was a conclusive determination of the issues between the appellants

and the appellees by a court of competent jurisdiction, and therefore res adjudicata as to those issues. *Tuolumne Gold Dredging Corporation v. Walter W. Johnson Co.* (DC Cal. 1947) 71 F. Supp. 111.

As Judge Lemmon said in that case:

> "Because one phase of the litigation was left unsettled and in that sense the judgment is interlocutory does not preclude the holding that the judgment is res adjudicata as to that phase which has been finally concluded." (113)

The fact is that the judgment of October 12, 1953, from which appellants appealed and in connection with which the supersedeas bonds were executed, has never been disturbed; it has only been supplemented and made final by the certificate of May 21, 1956. All motions aimed at that judgment have been repeatedly denied. It is conclusive of all issues between these parties unless it is disturbed by this Court on this appeal.

> "Where a motion for a new trial has been made and denied, the judgment is deemed to have become final as against further like motions; otherwise there would be no finality to a judgment so long as the losing party desired to attack it by such a motion." 39 Am Jur, Page 202.

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2. APPELLANTS ARE BOUND BY THE TERMS OF THE SUPERSEDEAS BONDS; THEY ARE ESTOPPED FROM REPUDIATING THEIR RESPONSIBILITY.

Appellants contend that the trial court erred in refusing to discharge the supersedeas bond executed

in connection with the appeal. It is our position that the rulings of the lower court were correct.

Without regard to the question of whether or not this bond is enforceable as a statutory supersedeas bond under Rule 73(d), Federal Rules of Civil Procedure, it is our contention that the bond is good as a valid common law obligation and enforceable as such.

In this connection, the following sequence of facts should be noted: The original judgment was filed and entered on October 14, 1953 (Old R. 14, No. 14,531); thereafter the appellants moved for stay of execution, and on October 30, 1953, this motion was granted pending disposition of the motions for new trial, conditioned upon appellant's posting bonds in the sum of $30,000.00; these bonds, for stay of execution and partial supersedeas were posted on October 30, 1953 (R. 27, 48, 62); on February 4, 1954, the Court filed its opinion denying the motions for new trial (Old R. 51), and on February 18, 1954, entered an order denying all motions previously filed by appellants; on February 23 and 27, 1954, appellants filed two separate notices of appeal (Old R. 26, 57); on March 9, 1954, appellees moved for judgment on the $30,000.00 stay of execution bonds previously posted, as the appellants had failed to post complete supersedeas bonds to cover the judgment. This motion was argued before the trial judge on April 2, 1954, and was granted by him on April 3, 1954, "unless supersedeas bond is applied for and allowed by 2:00 P.M. of Tuesday, April 6, 1954." The additional bond

to complete supersedeas was then posted and filed on April 9, 1954. (Old R. 27.)

Three years have now elapsed and during this time appellant Matanuska Valley Lines, Inc. has become insolvent and is in the hands of a receiver.

Appellate Courts have been presented on many occasions with the question of liability on a supersedeas bond which was legally insufficient to effect a stay of execution and where enforcement of judgment was in fact suspended. See Annotation 120 ALR 1062.

In *Haffner v. Commerce Trust Company* (Okla. 1938) 86 P(2d) 331, the defendants' denial of liability on the bond was based upon the claim that it was a nullity for the reason that it was without consideration, that it was unauthorized, and that there was nothing for it to supersede. The Court said:

> "There is no doubt that recovery may be allowed upon a bond as a common law undertaking even though it may be invalid as a statutory supersedeas bond."

Maryland Casualty Co. v. Marshall (Ky. 1928) 10 SW(2d) 485, is so persuasive in this regard that considerable portions of the opinion are quoted. In that case it was clear that the supersedeas bonds in question were actually void as statutory bonds, because the lower court had no jurisdiction to grant the appeals. The court, however, went on to point out:

> "It does not follow, however, that, as these bonds do not have the quality of statutory bonds, they are not good as common law obligations and enforceable as such. In the case of Cotton's

Guardian v. Wolf, 14 Bush 238, we said that a bond, although not good as a statutory bond, would be good as a common-law obligation if it were entered into voluntarily, for a valid consideration, and was not repugnant to the letter or policy of the law. Tested by these characteristics, the bonds involved in these cases were good common-law obligations. They were entered voluntarily, as the Collieries Company and the Maryland Casualty Company had the options of paying the judgments against the Collieries Company, of permitting their enforcement through the processes of the Court, of taking the chance that the plaintiffs would not undertake to enforce them until this court had passed upon them, or of attempting to stay them by the execution of the bonds, and it chose the latter alternative. * * * We now come to the only troublesome question concerning the validity of these bonds as common-law obligations, and that is the question of consideration. * * * The consideration for this undertaking which the Collieries Company and its surety sought and expected by the execution of these bonds was the stay of the execution of the judgments in question. Although not obliged to do so, since the bonds were not good as statutory bonds, yet as a matter of fact the appellees, relying upon the undertaking of the Collieries Company and the appellant, did forbear to enforce their judgments, and so the obligors by reason of their promise did in fact secure the stay of execution which they sought."

Such is exactly the parallel situation in the present case.

The rule is well settled that although a supersedeas bond not valid as a statutory bond must, to be enforceable as a common law bond, have a sufficient consideration, the receipt by the obligors of the contemplated benefits of the bond in the stay or suspension of proceedings on the judgment is sufficient consideration for the bond. This rule is supported by many authorities including the following: *Hewitt v. Landis* (Colo. 1924) 225 P 842; *Tanguary v. Beshor* (Colo. 1908), 94 P 22; *Lloyds Casualty Insurer v. Farrar, et al* (Tex. 1943) 174 SW(2d) 302.

There is a further substantial reason, based on estoppel, for agreeing with the lower court that the motion to exonerate the sureties on the supersedeas bond should be denied. The position of the appellants in this regard is that there was "no judgment" from which to appeal, and that the posting of supersedeas bonds, therefore, was unnecessary and meaningless and the sureties should be discharged.

The relevant portion of that supersedeas bond reads as follows: "The condition of this bond is that if the *judgment* in full herein be satisfied, together with costs, interest and damages for delay, *if for any reason* the appeal heretofore taken in this case be dismissed; or if the *judgment* be affirmed or modified and as affirmed or modified be satisfied in full together with such costs, interest and damages as the United States Court of Appeals for the Ninth Circuit may adjudge and award, then this bond shall be null and void; otherwise to remain in full force and effect." (Emphasis supplied) (Old R. 27, No. 14,529.)

Thus the appellants, themselves, in the supersedeas bond (as well as in other pleadings) have insisted repeatedly that there was a judgment in this case at all times since October 12, 1954. They have recited the fact of that judgment in the supersedeas bond, which they were allowed to post voluntarily at their own request.

> "The surety upon a supersedeas bond will not be heard to attack its validity, and is bound to pay the judgment against his principal." *Robertson v. Wilkinson* (CCA 5th, 1925) 10 F(2d) 311, 312.

In *McCarthy v. Alphons Custodis Chimney Const. Co.* (Ill. 1906) 76 N.E. 850, the Court said:

> "The recitals of the bond sued upon are conclusive as to the validity of the judgment mentioned in the bond. * * * So, in the case at bar, the appeal bond recites the existence of the judgment, and appellant is estopped from denying that there was such a judgment, or that it was void. The appellant here, as surety, voluntarily signed the engagement under his hand and seal for the payment of the judgment, and could not, therefore, deny the existence of the judgment, which he admitted by so signing the bond. * * * The bond was executed in order to enable the parties who signed it to take an appeal from the judgment to the Appellate Court. The bond recites that the appeal had been prayed for and obtained, and provides that the bond is void in case the appeal is prosecuted with effect. Hence the appellant . . . cannot be heard to say that no appeal was ever taken; nor can he be permitted

> to question the truth of the recitals in the bond. The bond in question is a voluntary contract. The expenses incurred by appellee in defending the appeal on the faith of the bond are a sufficient consideration for entering into it." (825-853).

Compare, *Perry v. Tacoma Mill Co.* (CCA 9th, 1907) 152 Fed. 115.

To the same effect is *Pierce v. Banta* (Ind. 1892) 31 NE 812; *Adams v. Thompson* (Neb. 1886) 21 NW 316; *Thalheimer v. Crow* (Col. 1889) 22 Pac 779; *Robertson v. Wilkinson* (CCA 5th, 1926) 10 F(2d) 311. In *Gudtner v. Kilpatrick* (Neb. 1883) 15 NW 708, there actually was no valid appeal whatever, because under the statute there was no right of appeal from the particular judgment. Nevertheless, the Court held that the surety bondsmen were estopped to deny liability.

> "To allow the defendant to set up and prove these facts to contradict his own recognizance would be to allow him to obtain a delay in the issuing of the execution upon the judgment rendered by the justice, and then, when the delay has been obtained, insist that the recognizance which procured it created no legal obligation." 15 NW 708 at 711.

So, in the present case, by the execution of the supersedeas bond, the defendant has obtained a delay of more than three years. When an actual execution was in the hands of the Marshal, whether valid or not, the appellants prayed and were granted the right of supersedeas. They raised no question as to the

propriety of the action taken by the trial court at that time. On the other hand, the sureties on the supersedeas bond voluntarily entered into this obligation in order to prevent the actual levy of execution which was then impending. Having voluntarily entered into such a contract, it would be most improper to now permit them to deny it. See, *W. J. Donnelly Co. v. Fidelity and Casualty Co.* (Ohio 1926) 155 NE 558, where the Court pointed out that the sureties should be estopped to deny their liability on a supersedeas bond where the bond had subserved one or more of the purposes for which it was given and the appellant had had the benefit thereof.

The Court noted that this should be especially true where the surety by signing the bond prevented the plaintiff from collecting on his judgment and enabled the defendant to put his property out of the reach of the plaintiffs. In *Buttnick v. Buttnick Jobbing & Investment Co.* (Wash. 1924) 227 Pac 852, the Court said:

> "Assuming for present purposes that the Buttnick Jobbing & Investment Company and J. M. Buttnick had no right of appeal, and that, on motions of the respondent their appeal would have been dismissed, yet they chose to appeal and doing so gave the bond which was accepted and relied upon by the respondent as a supersedeas bond under which, in fact, if not in law, the original judgment was superseded, and, after having gained the full purpose for which the bond was given, it would be bad law and bad morals to now permit them to say that because, forsooth, their appeal was unnecessary, or might

> have been dismissed, they may not avail themselves of their own mistake, and thus relieve both principals and sureties, and wholly deprive respondent of the security which the statute requires to be given when a judgment is superseded on appeal. The bond cannot be said to be without consideration. There was in fact a detriment to the obligee in that she relied upon the bond, and did not seek to enforce the judgment pending the appeal, even though it be thought that there was no benefit to the obligors, and that there was such a benefit is at least debatable. We think appellants cannot now be heard to question the sufficiency of the bond.''

Although the judgment, under the provisions of Rule 54(b) was not in fact final and therefore could not properly be executed upon, nevertheless, all parties were then treating the judgment as though it were final and enforceable and in fact the trial court had authorized the issuance of execution thereon and execution was in the hands of the Marshall. Instead of raising the question of finality with the trial court or in the Appellate Court, at that time, the defendant and the sureties chose to execute this supersedeas bond to suspend the execution which was then in the process of being made. It would indeed be ''bad law and bad morals'' to now permit these sureties to be exonerated, while the judgment against their principal stands and the appeal is undecided.

The argument of the appellants rests upon a fallacious and unsound major premise, to-wit: that because the trial court failed to comply with Rule

54(b) there was *no* judgment, or that the judgment was "invalid" or "void". (New Br. 7.)

Not so. The judgment of October 12, 1953, existed and continued to exist after the decision of this Court, in spite of the unfortunate language used. It became final and appealable when the District Court signed and entered the order and certificate on May 21, 1956. (R. 13.) The decision of this Court did not, in our opinion, obliterate the previous judgment, as would be the case had the judgment been expressly vacated or a new trial been ordered. This point alone is sufficient to distinguish those authorities cited by the appellants where the Appellate Court set aside the verdict and ordered a new trial, as in *Gelder v. National Surety Co.* (N.Y. S.Ct. 1912) 137 NYS 716, or where the order of the lower court was reversed and the judgment vacated, as in *Regierer v. United States Fidelity and Guaranty Co.* (N.Y. S.Ct. 1912) 136 NYS 42.

Note the language of the New York Supreme Court in the *Gelder* case quoted by the appellants at pages 9-10 of its new brief:

> "By the order of this Court setting aside the verdict herein and ordering a new trial, the foundation of the judgment was taken away. * * * The intent of the parties to the contract of suretyship was that the defendant should not be liable unless the liability of its principal was established." (718)

But, in the present case the verdicts were never set aside, nor was a new trial ever ordered, either by

the District Court or by this Court. The liability of the principal, Matanuska Valley Lines, was fixed by the judgment of October 12, 1953, and cemented firm by the denial of its motion for new trial on February 18, 1954. When these supersedeas bonds became effective as such on April 9, 1954, therefore, the liability of the principal was then just what it has been ever since, and the position of the sureties is still the same.

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3. THE TRIAL COURT DID NOT ERR IN CONTINUING THE BONDS IN EFFECT ON THIS APPEAL.

In the final portion of their argument, appellants contend that the refusal of the trial court to discharge these bonds and exonerate the sureties or to set a new bond has continued the bonds in full force and effect on the new appeal. (New Br. 20-24.) Although the lower court refused to make any such express finding, we concur in the opinion of the appellants as to the net result; the bonds are still insuring supersedeas at the present time.

However, unlike the appellants, we feel that this result is both lawful and proper; our reasons have been enunciated above.

From an examination of the face of the bonds appellants have attempted to classify the sureties into two groups: corporate compensated sureties, and individual non-compensated sureties, and have pointed out that different rules relative to liability govern the two classes. (New Br. 20.) We do not quarrel with

the principles of law stated by the appellants at this point, nor with the cases which they have cited. Again, however, they are arguing from a non-existent major premise. There is nothing in the record of any kind to indicate whether any of these sureties are compensated or uncompensated, nor is there anything to properly give the Court any reason or justification to speculate in that regard. Further, these rules of interpretation, in any event, are only to be used where the provisions of the bond in question are ambiguous and subject to different constructions. There is nothing ambiguous or doubtful about *the language* of the bonds in the present case; the only question raised is whether the bonds are still effective after dismissal of the original appeal.

Finally, appellants contend that these bonds should not be continued because the financial ability of the principal, Matanuska Valley Lines, has deteriorated in the three years since the bonds were signed. (New Br. 23.)

Of course, the chief reason for the execution of a supersedeas bond in any case is to insure the payment of the judgment in the event the principal is unable to pay it. That the principal may not be able to pay is the risk which the surety voluntarily assumes. The fact that Matanuska Valley Lines is insolvent, far from being an argument for release of these bondsmen, is a compelling reason why their liability should be continued. By signing these bonds they have prevented the injured appellees from collecting for their injuries when they might have done so, three years

ago. To permit these sureties to walk away now, before the merits of this appeal have been finally decided, would, we submit, shock justice.

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4. THE MOTION FOR NEW TRIAL WAS PROPERLY DENIED; THE JUDGMENT SHOULD BE AFFIRMED.

Appellants contend that the trial court erred in denying their motion for new trial and adopt the argument of their previous brief in this regard. (New Br. 24.)

This case was fully tried to a jury and lawful verdicts returned. Motions for new trial were briefed, fully argued, and denied by the trial judge who heard the evidence. Motions for a new trial were again briefed and argued before the successor judge in the lower court, and have again been denied.

There was ample evidence from which the jury could have, and did find that the appellant Matanuska Valley Lines had been negligent toward these appellees. We adopt the argument of our first brief (Br. 6-19) in this regard.

V.

CONCLUSION.

There has been no "extension" of the coverage of the supersedeas bonds which appellants voluntarily gave in this case, nor has there been any alteration or increase in the risk which they assumed. The judg-

ment which the bonds supersede is the same now as it was when they executed the bonds. The appellants are estopped to deny the validity of their obligation; in any event, the bonds are enforceable and should be continued as the contract of the parties.

We respectfully reiterate that the verdicts of the jury and the judgment of the lower court should not be disturbed. The judgment should be affirmed.

Dated, Anchorage, Alaska,
April 5, 1957.

Respectfully submitted,
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